No. 442

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

EDWARD SCHLECTER,

Petitioner,

—against—

JOHN F. FOSTER, Warden of Auburn Prison, at Auburn, New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH DEPARTMENT AND BRIEF IN SUPPORT THEREOF

AVEL B. SILVERMAN,
Attorney for Petitioner.

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Edward Schlecter, respectfully prays for a writ of certiorari to the Appellate Division of the State of New York, Fourth Department, the highest Court of the State in which a decision could be had, to review a determination of that Court, rendered on the 14th day of March, 1945, affirming an order of the Supreme Court, Wayne County, New York, which order dismissed the writ of habeas corpus sued out by your petitioner against John F. Foster, Warden of Auburn Prison, at Auburn, New York, where your petitioner is now incarcerated.

The Order Sought To Be Reviewed

Your petitioner sued out a writ of habeas corpus, directed to the Warden of Auburn Prison (R. 7). He asserted in his petition for such writ of habeas corpus (R. 11) that by reason of the facts therein alleged, he was restrained in his liberty, in violation of his rights under the Constitution of the United States. That the imprisonment of your petitioner was in violation of such Constitutional rights, was also asserted, claimed and urged in the brief submitted in his behalf in the court of first instance, as well as in the Appellate courts. The court of first instance dismissed the said writ (R. 4, opinion R. 27). An appeal was prosecuted by the petitioner to the Appellate Division of the Supreme Court of the State of New York, Fourth Department, resulting in an order of affirmance, without opinion, on the 14th day of March, 1945. Application was thereupon made in the said Appellate Division, for leave to appeal to the Court of Appeals, and which application was denied by the said Court on the 1st day of May, 1945. Thereafter, application was made to the Court of Appeals for leave to appeal to the said Court. Said application was denied on the 7th day of June, 1945. Accordingly, the Appellate Division was the highest Court of the State of New York, in which a decision could be had.

The time for presentation of this application has been extended to October 7, 1945, by order of Mr. Justice Reed, dated August 29, 1945.

Question Presented

Where a previous conviction of the accused has been utilized by indictment to increase the offense charged and the punishment therefor, from that applicable to a mis-

demeanor, to that of a felony, can such previous conviction again be utilized after conviction upon such indictment, to enable the prosecuting authorities to increase the number of convictions of the accused, and thus sentence him to a maximum period of his natural life in prison; and is such procedure violative of the rights of the accused under the Fourteenth Amendment of the Constitution of the United States?

Statement of Matters Involved and Relevant Statutes

The petitioner was charged with the violation of Section 408 of the Penal Law of the State of New York, the substance of which is as follows:

> "A person who * * * has in his possession * * * any instruments adapted, designed or commonly used for the commission of burglary * * * under circumstances evincing an intent to use or employ the same * * * in the commission of a crime * * * shall be guilty of a misdemeanor, and if he has been previously convicted of any crime, he is guilty of a felony * * *"

By reason of a previous conviction, the petitioner was indicted by the Grand Jury of Westchester County, New York, as for a felony (R. 16). The indictment charged a previous conviction, in December, 1923. Accordingly, pursuant to Section 408, the offense charged was increased from a misdemeanor to a felony.

Upon his conviction, the District Attorney filed an information (R. 23) under Section 1943 of the Penal Law, charging the petitioner with being a fourth offender.

Section 1943 provides: PROCEDURE RELATING TO RESENTENCING:

> "If at any time, either after sentence or conviction, it shall appear that a person convicted of a felony has

previously been convicted of crimes as set forth either in section nineteen hundred and forty-one or nineteen hundred and forty-two, it shall be the duty of the district attorney * * * to file an information accusing the said person of such previous convictions * * *"

Section 1942 provides: PUNISHMENT FOR FOURTH CONVICTION OF FELONY:

"A person who, after having been three times convicted * * * of felonies or attempts to commit felonies * * * commits a felony * * * shall be sentenced upon conviction of such fourth, or subsequent, offense to imprisonment in a state prison for an indeterminate term * * * but in any event the term upon conviction for a felony as the fourth or subsequent offense, shall be not less than fifteen years, and the maximum thereof shall be his natural life."

Section 1941 provides: PUNISHMENT FOR SECOND OR THIRD OFFENSE OF FELONY:

"A person, who having been once or twice convicted * * * of a felony * * * commits any felony within this state, is punishable upon conviction of such second or third offense, as follows:

* * * for an indeterminate term, the minimum of which shall be not less than one half of the longest term prescribed upon a first conviction, and the maximum of which shall be not longer than twice such longest term; provided, however that the minimum sentence imposed hereunder upon such second or third felony offender shall in no case be less than five years; except that where the maximum punishment for a second or third

felony offender hereunder is five years or less, the minimum sentence must be not less than two years * * *"

In charging the petitioner with being a fourth offender, the District Attorney included in the three previous offenses charged, the same conviction (in December, 1923) as had been previously utilized in the indictment to increase the offense charged from a misdemeanor to a felony (R. 24). Had such offense been omitted from those enumerated in the information, the petitioner would have been subject to the penalties of a third offender under Section 1941.

Upon filing the information, the petitioner was sentenced to a minimum term of fifteen years, and a maximum term of his natural life (R. 14).

Rulings of the Court Below

The Court of first instance, while inclined to adopt the view of the petitioner (R. 28), felt bound by the decision of the Court of Appeals in *People* v. *Heath* and *People* v. *Coleman,* 264 N. Y. 536, affirming without opinion, 237 App. Div. 209 and 211 (R. 28 and 29). The Appellate Division of the Supreme Court, Fourth Department, in affirming the order, rendered no opinion. The Court of Appeals, in declining to grant leave to appeal, likewise rendered no opinion.

Reasons for Allowing of Writ

1—For his commission of an offense under Section 408 of the Penal Law, normally a misdemeanor, the petitioner, by reason of a prior conviction, is required to be subjected to an increased punishment as for a felony. Upon conviction, the District Attorney files information, whereby he once again seeks to add to the punishment of the accused, by charging him as a fourth offender, predicated upon the same prior conviction. We contend that such prior convic-

tion, having been used to increase the punishment from a misdemeanor to a felony, has spent its force; it cannot again be used to still further increase the punishment, as in the present case, to a maximum term of the prisoner's life. In December, 1923, upon such prior conviction, the prisoner is sentenced to State's prison for three years (R. 24). In 1940, by reason of such prior conviction, an offense committed by the petitioner is subject to indictment (R. 16) (which would otherwise be a misdemeanor) and he is rendered amenable to increased punishment, predicated upon such prior conviction. Upon being convicted upon such indictment, the prisoner is once again, and for the third time, required to submit to further increased punishment for the offense committed in 1923. The procedure thus adopted is violative of the due process of law required by the Constitution.

2—The procedure for filing an information, after conviction for an offense, charging prior convictions, has been adopted and recognized as a substitute for charging prior convictions in the indictment. It has been so recognized by this Court, at the time the constitutionality of the laws providing for increased punishment to prior offenders was the subject of consideration. That it is an alternative remedy, and not a cumulative one, has been recognized by the Courts of Massachusetts, and indeed by the Court of Appeals of New York. To accumulate the increased punishments for the same offense, first by way of indictment and then by information after conviction, is contrary to due process of law, and inconsistent with the rulings of this Court.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Appellate Division of the Supreme

Court of the State of New York, Fourth Department, commanding the said Court to certify and send to this Court, a full and complete transcript of the record of all proceedings of the said Court, had in this cause, to the end that the said cause may be reviewed and determined by this Court.

Dated, New York, August 2nd, 1945.

AVEL B. SILVERMAN,
Attorney for Petitioner.

JAY A. GILMAN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

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Petitioner,

—against—

JOHN F. FOSTER, Warden of Auburn Prison, at Auburn, New York,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of Mr. Justice Gilbert, in the court of first instance, will be found at page 27 of the record. No opinion was rendered by the Appellate Courts.

Jurisdiction

The determination of the Appellate Division of the Supreme Court of the State of New York, Fourth Department, was rendered on the 14th of March, 1945. The Court of Appeals denied the petitioner's application for leave to appeal on June 7, 1945. The time for submission of this petition has been extended to October 7, 1945 by order of Mr. Justice Reed, dated August 29, 1945.

The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code (28 U. S. C. A. Sec. 344).

Statutes Involved

The statutory provisions of the Penal Law of the State of New York upon which the procedure now under attack was predicated, are Sections 408, 1941, 1942 and 1943 of the said Penal Law. Insofar as they are material to the questions of law here raised, they are set forth in the petition.

Statement of the Case

A summary statement of the case, and of the issues here presented, are set forth in the petition.

ARGUMENT

The procedure here under attack by the petitioner, has been sanctioned by the Court of Appeals in *People* v. *Coleman* and *People* v. *Heath* (264 N. Y. 536) affirming without opinion (240 Appellate Division 947). Two justices of the Appellate Division dissented. In an earlier decision in these cases (*People* v. *Heath*, 237 App. Div. 209, *People* v. *Coleman*, 237 App. Div. 211) Mr. Justice Martin, in his dissent, asserted that for the purpose of imposing punishment, the prior conviction of the defendant has spent its force, when used for the purpose of raising the offense from a misdemeanor to a felony.

> "Having been so used for that purpose, it would be equivalent to subjecting the defendant to double jeopardy if it were used a second time with a view of increasing the defendant's punishment again by charging him, in effect, with being a second offender under section 1941 of the Penal Law."

The validity of prior offender statutes, and the procedure for increasing punishment by information filed against the

accused, has been before this Court in *Graham* v. *West Virginia* (224 U. S. 616, 32 S. Ct. 583, 56 L. Ed. 917). This Court said (224 U. S. p. 626, 32 S. Ct. 586):

> "It is to prevent such a frustration of its policy '(referring to unknown prior convictions)' that provision is made for alternative methods; either by alleging the fact of prior conviction in the indictment and showing it upon the trial, or by a subsequent proceeding in which the identity of the prisoner may be ascertained and he may be sentenced to the full punishment fixed by law."

The same point was adjudicated with respect to a similar statute in the State of Massachusetts. *Plumbly* v. *Commonwealth*, 2 Metc. (43 Mass.) 413 and *Commonwealth* v. *Phillips*, 11 Pick (28 Mass.) 28. In the former decision, the Court pointed out that the methods provided by law for punishment of prior offenders, were in the alternative—either by charging the prior offense in the indictment, or by an information in legal form (2 Metc. (43 Mass.) 415, 416). Said the Court:

> "Both cannot be pursued, to obtain one and the same object; and as the conviction must by necessity be first in time, if the former convictions are then proceeded upon, it necessarily supersedes the other. Nothing remains for an information to reach."

Indeed, that the purposes of the so-called "Baumes Acts" (Sections 1941, 1942, 1943 of the Penal Law, *supra*) were intended to conform to the principle of alternative, and not cumulative, punishments, may be gathered from the report of the committee responsible for its enactment (Report of the Joint Legislative Committee on the co-ordination of civil and criminal practice acts (Baumes Committee Report,

N. Y. Legis. Doc. 1926, vol. 17, No. 84, p. 22). It may be further concluded from the opinion of the Court of Appeals in *People* v. *Gowasky*, 244 New York at page 460.

Nevertheless, we are here presented with a situation wherein a previous conviction of the petitioner, is utilized to increase the degree of crime and punishment therefor, from a misdemeanor to a felony; thereafter, it is again utilized, to enable the prosecutor to accumulate four convictions, and to sentence him to a maximum term in prison for his natural life.

A. The petitioner has been deprived of his liberty without due process of law.

B. The petitioner has been placed twice in jeopardy for the same offense.

For the reasons stated herein, and in the petition, the application for a writ of certiorari should be granted.

Respectfully submitted,

AVEL B. SILVERMAN,
Attorney for Petitioner.

JAY A. GILMAN,
Of Counsel.

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IN THE

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October Term 1945
No. 442

EDWARD SCHLECTER,

Petitioner,

against

JOHN F. FOSTER, Warden of Auburn Prison, at Auburn, New York,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BATAVIA TIMES, LAW PRINTERS,
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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the respondent in the above entitled cause, by the Attorney-General of the State of New York, and opposes the petition herein and asks that it be denied.

Statement of the Case

The petitioner prays for a writ of certiorari to review the decision of the Appellate Division of the Supreme Court of the State of New York, Fourth Department, rendered March 14, 1945, affirming an order of a Special Term of the Supreme Court of the State of New York, held in and for Wayne County, New York, which dismissed a writ of habeas corpus issued on behalf of petitioner against John F. Foster, as Warden of Auburn Prison at Auburn, New York, where-

in he was and is incarcerated (R. 4-6*). The Special Term wrote an opinion (R. 27-29) and the Appellate Division affirmed without opinion. Application to the Appellate Division for leave to appeal to the Court of Appeals of the State of New York was denied and subsequent application to the Court of Appeals for leave to appeal to that Court was likewise denied.

The Facts

The petitioner was indicted by the grand jury of Westchester County for the crime of having in his possession burglar's tools, having previously and on December 27, 1923 been convicted of the crime of burglarly, third degree and was convicted thereof on December 9, 1940, by verdict of a jury (R. 13-17). Thereafter the District Attorney filed an information, pursuant to section 1943 of the Penal Law, accusing petitioner of having been thrice previously convicted of felonies, one of which was the aforesaid conviction of December 27, 1923 (R. 23-24), and, after proper proceedings had upon this information, and on December 9, 1940, he was sentenced by the Westchester County Court, pursuant to section 1942 of the Penal Law, to a term of from fifteen years to life (R. 13-14).

This petition is based upon the claim that petitioner was not accorded due process of law.

POINT I

Petitioner did not exhaust his remedies in the State courts and there has been no decision of the merits by the highest court of the State in which a decision could be had.

The Constitution of the State of New York (Art. VI, § 7), defining the jurisdiction of the Court of Appeals, provides:

* Record references throughout are to pages of the Record in the New York Supreme Court, Appellate Division, Fourth Department.

> "Appeals may be taken to the court of appeals in the classes of cases enumerated in this section. * * *.
> In civil cases and proceedings as follows:
> (1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification."

If the petitioner is correct in his contention that the case presents a question under the Constitution of the United States, he was entitled to appeal to the Court of Appeals as of right. He did not avail himself of that right and there has been no decision by the Court of Appeals upon that constitutional question.

Section 589 of the Civil Practice Act of New York authorizes appeals to the Court of Appeals by permission of the Appellate Division or by permission of the Court of Appeals, but only from an order or judgment which is not appealable as a matter of right.

An identical question concerning the jurisdiction of this Court was presented in *Morris Plan Industrial Bank of New York* v. *Graves et al.* (1941), 314 U. S. 572. This Court's decision was as follows:

> "*Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a final judgment of the highest court of the State on the constitutional question presented. The Chief Justice took no part in this decision."

In that case, the appellant, in addition to moving the Appellate Division and the Court of Appeals for leave to appeal, which motions were denied, had served notice of appeal to the Court of Appeals as of right from the final

order of the Appellate Division. After the dismissal of the appeal to this Court, the appeal as of right to the Court of Appeals was brought on for argument and resulted in a decision affirming the order appealed from (288 N. Y., Mem. p. 91). Upon appeal to this Court, the appeal was dismissed for the want of a substantial Federal question (317 U. S. 591).

In the instant case, no appeal has been taken to the Court of Appeals.

POINT II

The petition presents no substantial Federal question.

The double jeopardy provision of the Fifth Amendment is, as this Court has many times held, without application to action by the States.

> *Barron* v. *Baltimore* (1833), 7 Pet. 243;
> *Twining* v. *New Jersey* (1908), 211 U. S. 78;
> *Palko* v. *Connecticut* (1937), 302 U. S. 319, 322;
> *Feldman* v. *United States* (1943), 322 U. S. 487, 490.

Petitioner's reliance in this Court, accordingly, is upon the due process clause of the Fourteenth Amendment (Petition, p. 3).

The rule is, we believe, that to constitute a denial of due process under that clause, the State action must violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental".

> *Palko* v. *Connecticut, supra,* p. 325;
> *Brown* v. *Mississippi,* (1936), 297 U. S. 278, 285;
> *Snyder* v. *Massachusetts* (1934), 291 U. S. 97, 105;
> *Hebert* v. *Louisiana* (1926), 272 U. S. 312, 316;
> *Rogers* v. *Peck,* (1905), 199 U. S. 425, 434.

Petitioner is an old offender. He has been found guilty of four serious crimes against the laws of the State of New York. For the fourth and last of these crimes, he has been sentenced to an indeterminate sentence, the minimum of which is fifteen years and the maximum his natural life (R. 14), pursuant to §1492 of the Penal Law of the State, quoted on page 4 of the petition herein.

"The propriety of inflicting severe punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted."

Mr. Justice Hughes in *Graham* v. *West Virginia* (1911), 224 U. S. 616, at p. 623.

The last of petitioner's crimes would have constituted a misdemeanor under the laws of the State, rather than a felony, except for his previous conviction of a felony (Penal Law, § 408, quoted at p. 3 of the petition). That gave rise to the contention in the State courts that it was not the legislative intention that a previous felony conviction should be used to raise a later crime from a misdemeanor to a felony and also to treat the last conviction as a conviction of a felony for the purpose of imposing increased punishment under the fourth offender statute and to the contention that it would be unconstitutional to do so. The question of legislative intention has been decided adversely to the petitioner by the State courts.

We think that an altogether sufficient answer to the petitioner's contention is that the infliction of the increased punishment upon him would not have violated any fundamental principle of justice if such increased punishment had, by statute, been made to depend upon two previous

felonies plus a misdemeanor, or even of three previous misdemeanors. This Court, we are sure, is not concerned with the extent of the term of imprisonment imposed by the States for violation of their laws; certainly not when the punishment is inflicted upon confirmed criminals who repeatedly flout their laws.

At the time petitioner committed his fourth offense, he knew, or should have known, that it would constitute a felony and would be the fourth felony which he had committed. Certainly it is not shocking to the principles of justice and conscience that he was treated accordingly.

CONCLUSION

It is submitted that this cause presents no question within the jurisdiction of this Honorable Court, and that the petition should be denied accordingly.

Dated: October 15, 1945.

Respectfully submitted,

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